Supreme Court, U.S.
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No. 07-

IN THE
Supreme Court of the United States

CHARLES SCOTT,

Petitioner,

v.

JAMES MERCIER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this action, the Appellate Court affirmed the decision of the United States District Court Southern District of Georgia Waycross Division holding that a deputy sheriff who arrived in an official vehicle of the Sheriff's Department at the home of the Plaintiff and was wearing his uniform and badge and carrying a weapon, was entitled to go upon the Plaintiff's property where his home was situated without a warrant and without a crime being committed in the presence of the deputy sheriff and remain on the property after he was instructed to leave and physically attacked the Plaintiff from behind by slamming his face into the wall of his house. Questions presented are:

(1) Did the Court err in affirming the judgment of the trial court that Eleventh Amendment sovereign immunity applied even though the Sheriff is a County official and his office and the County are not arms of the state?

(2) Did the Court err in granting sovereign immunity to the Defendant because the Plaintiff failed to challenge an official policy or practice of the Brantley County Sheriff's Office which, it is submitted, should have been unnecessary and futile because no law enforcement supervisory official would have a policy permitting the law enforcement officer to go upon a person's private property without permission when no crime is being committed and without a warrant and at that time and place strike a person who is not committing a crime and who is on his own property as such a policy would support unlawful and unconstitutional acts.

In addition the Court's ruling was contrary to a decision of the Supreme Court of Georgia which is the highest court of Georgia which decision stated that an officer performing a discretionary act is entitled to official immunity unless he or she "acted with actual malice or with intent to cause injury." *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996).

Likewise, the Court's holding is contrary to 42 U.S.C. § 1983 authorizing suits to redress deprivations of civil rights by persons "acting" under color of any "state statute, or regulation, custom, or usage". 42 U.S.C. § 1983. Section 1983 imposes liability upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia". Id. The "under color of state law" element of a prima facie case requires a plaintiff to show that the defendant acted under color of state law or pursuant to a custom or usage having the force of law. *Adicks v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970). The same case held that to act under color of state law does not require that the defendant be an officer of the state, but only a willful participant in joint activity with a state or its agents. *Adicks v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970). Further, this Court ruled that the Plaintiff is not required to show some authority under state law, state custom, or state usage purporting to justify the action of the state's constitution or laws. A police officer's exercise of arbitrary or excessive force or a government official's discretionary abuse of power which goes beyond the scope of his or her authority will usually have been performed under color of state law

for purposes of Section 1983 liability. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) overruled on other grounds by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). In *Monroe*, police officers were held to have acted under color of state law in making a patently unlawful search and arrest. Likewise in an opinion of this Court in *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770 (1964) this Court found that there was State action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, identified himself as a deputy sheriff and wrongfully arrested Black park patrons who refused to leave the park in response to the order.

Further this Court held that constitutional liability attached to those wrongdoers who "carry a badge of authority of [the government] and represented in some capacity". *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191, 109 S. Ct. 454 (1988). Likewise this Court held that a Defendant acts under a color of state law when he abuses a position given to him by the state. *West v. Atkins*, 487 U.S. 42, 5108 S. Ct. 2250 (1988).

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OPINIONS BELOW

The opinion of the United States District Court Southern District of Georgia Waycross Division is styled as *Charles Scott v. Deputy Sheriff James Mercier, Deputy Sheriff of Brantley County*, which is unreported.

The opinion of the Court of Appeals for the Eleventh Circuit containing the same styling is also unreported. Both opinions are set forth in the appendix hereto as is the order denying the petition for rehearing which is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on March 10, 2008 and the order denying the petition for rehearing was entered on April 3, 2008 and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Georgia's Constitution Art. I, Sec. II, Par. IX (d) states,

> . . . all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance or the negligent failure to perform the ministerial functions and may be liable for injuries and damages if they act with

> actual malice, or with actual intent to cause injury in the performance of their official functions . . .

42 U.S.C.A. § 1983 provides that liability is imposed upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory of the District of Columbia".

United States Constitution Amendment IV, the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment XI, the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens in another state, or by citizens or the subjects of any foreign state.

United States Constitution Amendment XIV, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Constitution, Article IX. Sec. I, Par. III (a) (b) (a) . . . sheriff . . . shall be elected by the qualified voters of their respective counties for terms of four years and shall have such qualifications, powers and duties as provided by general law.

County officers listed in sub-paragraph (a) of this paragraph may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law. Minimum compensation for said county officers may be established by the general assembly by general law. Such minimum compensation may be supplemented by local law or, if such authority is delegated, by local law, by action of the county governing authority.

STATEMENT OF THE CASE

Plaintiff-Appellant, Charles Scott (hereinafter "Plaintiff" or "Appellant"), filed a Complaint with the United States District Court for the Southern District of Georgia on May 5, 2006. (R.1) The Scheduling Order of August 11, 2006, set December 23, 2006, as the last date for filing of all civil motions. (R.9). Defendant sought an extension of time to file a Motion for Summary Judgment (R.15) and it was granted, extending the time to file through January 13, 2007. (R.6). Defendant filed a Motion for Summary Judgment on January 12, 2007, based on qualified immunity and Fourth Amendment issues. (R.17). On January 31, 2007, Plaintiff filed a Motion to Amend/Correct his Complaint. (R.23). Plaintiff's opposition to Defendant's Motion for Summary Judgment was filed on February 1, 2007. (R.24-R.25). On February 12, 2007, Defendant filed a

response brief to Plaintiff's opposition to Defendant's Motion for Summary Judgment. (R.29). Plaintiff filed his reply to Defendant's Response to Plaintiff's Opposition to Motion for Summary Judgment on February 28, 2007. (R.30). On March 3, 2007, the Court granted Plaintiff's Motion to Amend Complaint. (R.32). The Complaint, as amended, names Deputy Sheriff James Mercier in his official capacity. (R.33).

On June 28, 2007 the Court set a status conference for June 29, 2007. (R.38). The minutes from the conference were entered on June 29, 2007, but the record indicates that the minutes were modified on July 6, 2007. (R.39). The minutes indicate that there is an outstanding motion for summary judgment and "Defendant says there are outstanding claims not addressed in the present motion for summary judgment. Defendant wants to amend their motion for summary judgment or either file a second motion for summary judgment." (R.39). In the minutes, the trial court directs Defendant to file an addendum to the Motion for Summary Judgment within 3 weeks. (R.39). Defendant filed his Amended Motion for Summary Judgment on July 20, 2007, raising the Eleventh Amendment Sovereign Immunity issue for the first time. (R.41). Plaintiff filed his reply brief in opposition on July 30, 2007. (R.43). On September 14, 2007, the trial judge granted Defendant's motion for summary judgment and the Judgment was entered on September 19, 2007. (R.51-R.52). The Court's order dismissed the claims against Defendant as barred by the Eleventh Amendment. (R.51). On September 21, 2007, Plaintiff filed his notice of appeal. (R.53).

A. Statement of Facts

On or about September 12, 2005, Plaintiff and his wife, were taking care of three children, who were at their home, at the request of their mother and custodial parent, Karen Gibson (Deposition of Marlene Scott ("M. Scott") (M. Scott 15:23-16:1); Deposition of Charles Scott ("Scott") 30:2-3; 36:14-20; 40:8-9). On that date, the Defendant, while acting as deputy sheriff and under color of authority of Georgia law, forcefully entered the property of the Plaintiff, without authority or invitation, and told Plaintiff he was going "in your house and get the kids." (Scott 30:2-3; 39:21-24). Plaintiff did not feel comfortable releasing the children from his charge and asked Defendant if he had a warrant or some other paperwork regarding the children, to which the Defendant stated he was going in the house one way or another and getting the kids. (Scott 42:21- 43:2).

Plaintiff told Defendant that unless he had the proper paperwork, he "was not coming in my house." (Scott 39:16-24; 42:21-25). Defendant then shoved the gate located at the entrance to the Plaintiff's home into Plaintiff, knocking the Plaintiff back from the gate and cutting Plaintiff's arm. (Scott 43:17-44:9). Plaintiff requested that Defendant call the sheriff to the scene and Defendant refused, stating, "I am the law and I am going in that house one way or another." (Scott 44:10-14). Plaintiff told Defendant that unless he had the proper paperwork, he "was not coming in my house." (Scott 39:16-24; 42:21-25).

Both men walked to the porch (Scott 49:20-24) and Plaintiff stated that he would call the Sheriff himself.

(Scott 45:12-14). When Plaintiff turned to open the door to his home, the Defendant violently blind-sided him and shoved Plaintiff's face into the wall of his home. (Scott 48:1-7). This action by Defendant was unprovoked and restrained Plaintiff and Defendant then attempted to spray Plaintiff with mace. (Scott 49:3-5; 50:17-20). At all times relative to this incident, Plaintiff was a free citizen and was not suspected of committing any crimes. Although Plaintiff remained calm, Defendant was aggressive from the time he arrived at the Plaintiff's property. (Scott 46:1-2).

Defendant did not give any warnings to Plaintiff not to enter his house or that he was going to be seized or restrained in any way. (Scott 50:17-18). In fact, the first time Defendant told Plaintiff he could not enter his home was after he had been injured by the Defendant who also threatened him with mace. (Scott 50:17-18). As a direct result of the Defendant's attack and beating of Plaintiff, Plaintiff suffered severe injuries, including bruises, lacerations, injury to his mouth and teeth and a broken nose. (Scott 41:4; 50:8-14).

B. Standard of Review

This Court reviews de novo a district court's ruling regarding Eleventh Amendment immunity. *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000). An appeal of the granting of summary judgment is a de novo proceeding to determine whether the trial court had applied the correct summary judgment standard after all disputed facts are considered in a light most favorable to the non-moving party and giving the respondent all reasonable

inferences and resolving conflicts in his favor. *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998); *Cole v. Central Data Corp.* 947 F.2d 313 (C.A. 87). The Court must answer the legal question of whether a defendant is entitled to qualified immunity under that version of the facts. *Thornton v. City of Macon*, 132 F.3d 1395, 1397 (11th Cir. 1998).

This Court must approach the facts from the plaintiff's perspective because "the issues appealed here concern 'not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law.'" *Sheth*, 145 F.3d at 126 (quoting *Johnson v. Jones*, 515 U.S. 304, 311, 115 S. Ct. 2151, 2155 (1995)). For summary judgment purposes, all claims that law enforcement officers have used excessive force—deadly or not—in the course of any arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard[.]' Whether the amount of force used was reasonable is determined objectively "from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight" and "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 409 U.S. 386, 109 S. Ct. 1864, 1872, 104 L. Ed. 2d 443.

REASONS FOR GRANTING THE PETITION

I. The District Court Erred in Granting Defendant's Amended Motion for Summary Judgment.

A. A conflict exists in the case law as decided in the Eleventh Circuit, Supreme Court of Georgia and United States Supreme Court on the issue of Eleventh Amendment Sovereign Immunity and the issue has been wrongly decided in the underlying case to the prejudicial detriment of Appellant.

Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S. Ct. 473, 476 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation custom, or usage." 42 U.S.C. § 1983. Section 1983 imposes liability upon every person who subjects a person to a deprivation of a federally protected right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia." *Id.* The "under color of state law" element of a prima facie case requires a plaintiff to show that the defendant acted under color of law or pursuant to a custom or usage having the force of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, (1970). To act under color of state law does not require that the defendant be an officer of the state, but only a willful participant in joint activity with a state or its agents. *Id.*

The term "under color of law" includes not only action taken by state officials pursuant to state law, but also action clothed with the authority of state law. Thus, the plaintiff is not required to show some authority under state law, state custom, or state usage purporting to justify the actions of the state's constitution or laws. A police officer's exercise of arbitrary or excessive force, or a government official's discretionary abuse of power which goes beyond the scope of his or her authority will usually have been performed under color of state law for purposes of section 1983 liability. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), overruled on other grounds by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

In *Monroe v. Pape*, police officers were held to have acted under color of state law in making a patently unlawful search and arrest. In *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770, (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, and identified himself as a deputy sheriff and wrongfully arrested black park patrons who refused to leave the park in response to his order.

In the context of an arrest made by a police officer, the "action under color of state law" element of the prima facie case often is easily established because of the apparent authority conferred by a police uniform, a police officer's actions while in uniform may be considered actions taken under color of state law even though their ulterior purpose is private and unrelated to legitimate law enforcement ends. *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981), *reh. denied*, 659 F.2d 1079 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982).

The Sixth Circuit has gone even further by holding that when an officer acts pursuant to his official duty, even without identifying himself as a policeman and without a uniform or badge, he engages in state action. *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975). The U.S. Supreme Court held, Constitutional liability attached only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.' *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 109 S. Ct. 454 (1988). A defendant acts under color of state law when he abuses a position given to him by the state. *West v. Atkins*, 487 U.S. 42, 50, 108 S. Ct. 2250 (1988).

Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Shands Teaching Hospital & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). Where a police officer is dispatched to a home regarding a civil matter, the police officer may not lawfully remain on the property once the owner requests that he leave. *Thornton v. Macon*, 132 F.3d 1395, 1399 (11th Cir. 1998). Under that test, the "question is whether an officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting the officer, without regard to any underlying intent or motivation on the officer's part." *Graham v. Connor*, 490 U.S. 386, 1009 S. Ct. 1865 (1989). The Fourth Amendment of the United States Constitution subjects any seizure of a person by an officer, through the use of force, to its reasonableness requirements. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). Accordingly, the reasonableness of a particular

use of force must be judged from the perspective of an objectively reasonable officer. *Reed v. Hoy*, 909 F.2d 324, 328 (9th Cir. 1990) (citing *Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865 (1989)).

The highest court of Georgia held that an officer performing a discretionary act is entitled to official immunity unless he or she "acted with actual malice or with actual intent to cause injury," *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996). In order to receive qualified immunity, the public official "must first prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991)(quoting *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988). If the defendant was not acting within his discretionary authority, he is ineligible for the benefit of qualified immunity. *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002). The Defendant made no statement nor submitted any document that he was acting with the scope of his discretionary authority.

Actual malice in rulings on this issue denotes "express malice or malice in fact." *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 102 S. Ct. 2727, 2729 (1982). Malice was showed by the Defendant striking the Plaintiff forcefully.

Thus, such immunity exists only "insofar as [the officer's] conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Id.*

In this case, Plaintiff's § 1983 claim includes an infringement on his property rights and an excessive force claim as premised upon a clearly established right of which the Defendant should have known, namely the right to be free from unreasonable force as guaranteed by the Fourth and the Fourteenth Amendments to the United States Constitution. It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989); *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996). *Graham v. Connor*, is the seminal case on this issue containing, the most cogent statement of the position of the courts on this important issue. The Court's must balance the force used against the need, to determine whether the force used was "greater than is reasonable under the circumstances." *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002). This determination "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force and because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, the courts have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly. This is because police misconduct cases almost always turn on a jury's credibility determinations. *Id.*

In this case a county deputy sheriff entered property without permission or a warrant and committed an assault and battery on the Plaintiff, and this action was brought against him in his official

capacity. Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Teaching Hospital v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000).

The Eleventh Circuit made a statement in its ruling in favor of the Appellant on the issue of qualified immunity in *Jordan v. Mosley*, 487 F.3d 1350, 1354 (11th Cir. 2007) that would clearly apply to the Appellee deputy sheriff in the instant case. It stated "We first note the obvious fact that Deputy Mosley neither arrested Plaintiff nor obtained the pertinent arrest warrant. In the Eleventh Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment. *Rodriguez v. Ritchey*, 539 F.2d 394, 400 (5th Cir. 1976).

A case decided by the Eleventh Circuit Court in 1998 is factually similar to the instant case and application of the law directly in point with the facts in the ruling made in the trial court. When a police officer is dispatched to a home regarding a civil matter the police officer may not lawfully remain on the property once the owner requests that he leave. *Thornton v. Macon*, 132 F.3d 1395, 1399 (11th Cir. 1998). In *Thornton*, an officer was dispatched to the plaintiff's residence at the request of plaintiff's former girlfriend, who requested police assistance to resolve a civil dispute. *Id.*, at 1397-98. The girlfriend wanted to return a set of keys to the plaintiff in exchange for a mattress she claimed belonged to her, which was in the residence. *Id.* The Court stated that the officer lawfully could peaceably approach the front

door and attempt to deliver the keys and attempt to retrieve the mattress; in doing so he would merely be attempting to mediate and diffuse a contentious situation. *Id.* at 1399. The officer could not force such an exchange and could not remain on the *property* after the plaintiff had refused to make the exchange. *Id.* [emphasis added]. The plaintiff in *Thornton* had committed no crime and had not threatened anyone; once he had asked the officer to leave, the continued presence and attempt to retrieve the mattress by force was not pursuant to the officer's official duties and was outside the officer's authority. *Id.*

This ruling on a § 1983 claim by the Eleventh Circuit Court of Appeals contains facts comparable to the factual events in the instant case and should have been followed by the Eleventh Circuit in the ruling on this case.

In determining whether the Plaintiff's rights were violated in this § 1983 claim, the entitlement to qualified immunity is determined by an objective reasonableness test. *Graham v. Connor*, 490 U.S. 386, 1009 S. Ct. 1865 (1989). Under that test, the "question is whether an officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting the officer, without regard to any underlying intent or motivation on the officer's part." *Id.*

Applying the above test to the facts in this case and construing those facts most favorably to plaintiff as the party opposing summary judgment, we submit that the Court should hold that the entry onto the Plaintiff's property without permission or cause and the use of

force against the plaintiff was not objectively reasonable. The facts, when construed in plaintiff's favor, do not demonstrate that Defendant had probable cause to arrest the plaintiff nor did he have a warrant enabling him to lawfully enter onto the Plaintiff's property before he forcibly struck the Plaintiff. As was stated by the Eleventh Circuit Court in *Thornton*, "no reasonable police officer would have believed that the officer(s) had probable cause to arrest" *Thornton*, at 1399.

This is especially so in the present case where at all times relative to this incident, Plaintiff was a free citizen and was not suspected of committing any crimes. Although Plaintiff remained calm, Defendant was aggressive from the time he arrived at the Plaintiff's property. (Scott 46:1-2). Defendant did not give any warnings to Plaintiff not to enter his house or that he was going to be seized or restrained in any way. (Scott 50:17-18). In fact, the first time Defendant told Plaintiff he could not enter his home was after he had been injured by the Defendant who also threatened him with mace. (Scott 50:17-18).

As a direct result of the Defendant's attack and beating of Plaintiff, Plaintiff suffered severe injuries, including bruises, lacerations, injury to his mouth and teeth and a broken nose. (Scott 41:4; 50:8-14).

B. The Trial Court Erred in Finding that Defendant in his position as a deputy sheriff in the state of Georgia is an "Arm of the State" and therefore, Entitled to Eleventh Amendment Immunity.

The trial court erred when it found that Defendant is an arm of the state. Whether a defendant is an "arm of the State" must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *Shands Teaching Hospital & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). Defendant and the trial court relied on *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), for the proposition that a Georgia sheriff, in his official capacity, is an arm of the state and that his deputies are therefore protected by the Eleventh Amendment. In addition, the trial court stated that a claim against officers of a County Sheriff's Department is tantamount to a claim against the Sheriff's Department itself and consequently, the Defendant is entitled to Eleventh Amendment immunity.

In *Manders*, an arrestee brought a § 1983 claim against a sheriff in his official capacity after he was allegedly beaten by a sheriff's deputy at the county jail. The Eleventh Circuit held that the sheriff was an "arm of the state" in "establishing use of force policy at the jail and in training and disciplining his deputies in that regard," and was therefore entitled to Eleventh Amendment immunity. *Manders*, 338 F.3d at 1319. In *Manders*, the Eleventh Circuit noted that it was bound by prior panel precedent to treat a Georgia sheriff as an agent of the county, rather than the state, for

purposes of Eleventh Amendment immunity. 285 F.3d at 993. The Eleventh Circuit, however, proceeded to question the correctness of its prior panel precedent on this issue, and concluded that "Georgia sheriffs are agents of the state, not counties, when performing their law enforcement duties as to use of force [in the jail setting]." 285 F.3d at 993. The *Manders* decision only considered the narrow function of "establishing use of force policy at the jail," and the Eleventh Circuit explicitly declined to decide whether county sheriffs are arms of the state for any of their other specific duties. *Manders*, 338 F.3d at 1319; *Scruggs v. Lee*, No. 06 155112007 WL 1745898, *2 (11th Cir. June 15, 2007) (same).

The Eleventh Circuit has not extended *Manders* to all sheriff functions. *See Grech v. Clayton County*, 335 F.3d 1326, 1332 35 (11th Cir. 2003)(plurality en banc decision). The Georgia Constitution designates the sheriff as a "county officer," and the Georgia Supreme Court has held that a county sheriff is a separate constitutional entity. Ga. Const. art. IX § 1, ¶ 3(a) (b); *Bd. of Comm'rs of Randolph County v. Wilson*, 260 Ga. 482, 482, 396 S.E.2d 903 (1990). Furthermore, this Court has ruled that a County is not an arm of the State in a Georgia case. *Northern Insurance Company of New York v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367. Therefore the lower courts erred in extending *Manders* and holding that a Georgia Deputy Sheriff is an "arm of the state" for the general law enforcement functions at issue in this case.

In addition, the proceedings below in this case did not establish who would pay a judgment, the state or

the county. The USDC Order essentially states that the payment of any damages award are irrelevant and this approach completely ignores the appropriate judicial standard of *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. at 1358 (1974)(overruled on other grounds by *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)) and *Travelers Indem. Co. v. School Bd. of Dade County, Fla.*, 666 F.2d 505, 509 (11th Cir. 1982), where both hold that entities are immune only if it is a "virtual certainty" that the state will foot the bill. *Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527-28 (11th Cir. 1990). Importantly, this is a fact question which must be determined in every case where Eleventh Amendment immunity is involved. *Id.* For the foregoing reasons the USDC erred in granting Eleventh Amendment Sovereign Immunity to Defendant.

II. The correct test for determining whether a political subdivision of Georgia is an "arm of the state" was not applied by the lower courts in deciding this case.

The Georgia Supreme Court's decision in the *Hines v. Georgia Ports Authority*, 278 Ga. 632, 604 S.E.2d 189 serves to correct the District Court's rejection of the *Vierling v. Celebrity Cruises* analysis by making it the applicable standard for use when evaluating the application of sovereign immunity of Georgia State agencies. *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003) In *Vierling*, the Eleventh Circuit held that the Port Authority was not entitled to sovereign immunity as it was financially self-sufficient, generated its own revenues, and paid its own debts. "Furthermore, (the Eleventh Circuit reasoned), **"the state has no control over the operation of the facility and Florida law treats the Port Authority, as an entity of the county, not of the state."** *See Vierling v. Celebrity Cruises*, 339 F.3d at 1315 (*Emphasis added*).

Because of the Georgia Supreme Court's adoption of *Vierling* in *Hines v. Georgia Ports Authority*, *supra*, at page 93 certiorari should be granted and the District Court's September 14, 2007, order as affirmed in the appellate court must be reversed because this Court in *Northern Insurance Company of New York*, *supra*, the Court has already tacitly recognized that Chatham County cannot serve as an arm of the state under the *Vierling* test. In order to remove any confusion as to why Chatham County is not an "arm of the state" under the *Vierling* test the Plaintiffs provide the following review of the applicable facts and law.

In *Vierling*, the Eleventh Circuit stressed the importance of determining whether the state or the county would ultimately be responsible for satisfying any adverse judgment. 339 F.3d at 1314. Specifically the Eleventh Circuit noted:

> Although no single factor is dispositive, the third factor, the source of the entity's funds and responsibility for satisfying judgments, is "of considerable importance." *Doe*, 519 U.S. at 430, 117 S. Ct. at 904. "Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Id.* at 429, 117 S. Ct. at 903-04 (*internal quotation marks omitted*).

339 F.3d at 1314. (*citing Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)).

The other two factors of the *Hines/Vierling* test "are mixed but tend to weigh towards a finding of no immunity" just as they did in *Hines* when no sovereign immunity was found even though the Ports Authority was "performing an essential governmental function."

CONCLUSION

The Defendant deputy sheriff was acting as a county official and in violation of the strictures of the U.S. Constitution, Articles, IV, XI and XIV and 42 U.S.C.A. § 1983 and clearly showed actual malice all of which eliminate his entitlement to eleventh amendment immunity. The trial and appellate courts erred in granting him eleventh amendment sovereign immunity contrary to ruling of the Georgia Supreme Court, the highest court in Georgia and of this Honorable Court.

Respectfully submitted,

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